

The Honorable Marsha J. Pechman

CC TO JUDGE DJ  
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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

03-CV-02976-CMP

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES ODOM, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

MICROSOFT CORPORATION, a  
Washington corporation; BEST BUY CO.,  
INC., a Minnesota corporation,

Defendants.

No. C03-2976P

**FIRST AMENDED  
COMPLAINT - CLASS ACTION**

**DEMAND FOR JURY TRIAL**

Plaintiffs, on behalf of themselves and all others similarly situated, allege as follows:

**PARTIES**

1. Plaintiff James Odom is a resident of Moraga, California.
2. Plaintiff Katherine Moureaux-Maloney is a resident of Reno, Nevada.
3. Defendant Microsoft Corporation ("Microsoft") is a corporation organized under the laws of the State of Washington and maintains its headquarters in Redmond, Washington.
4. Defendant Best Buy Co. Inc. ("Best Buy") is a corporation organized under the laws of the State of Minnesota and maintains its headquarters in Eden Prairie, Minnesota.

**JURISDICTION AND VENUE**

5. This action asserts claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., the Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq., the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010 et seq., and for unjust enrichment. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1367, 18 U.S.C. § 1965(a), and 15 U.S.C. § 1693m(e). Venue is proper in this District under 18 U.S.C. § 1965(a), because Defendants reside, are found, have agents, or transact their affairs here.

**AGENCY AND CIVIL CONSPIRACY ALLEGATIONS**

6. At all times herein mentioned, Defendants were the agents, principals, employees, servants, partners, joint venturers, and representatives of each other. In doing the acts hereinafter alleged, they each were acting within the scope and course of their authority as such agents, principals, employees, servants, partners, joint venturers, and representatives, and were acting with the permission and consent of the other Defendant.

7. Microsoft and Best Buy had knowledge of and agreed to the misconduct alleged herein. Microsoft and Best Buy conspired with each other to engage in the common course of misconduct alleged herein, or aided and abetted that common course of misconduct, for the purpose of enriching themselves at the public's expense, resulting in damage to Plaintiffs and all others similarly situated.

**SUBSTANTIVE ALLEGATIONS**

8. Microsoft develops, licenses, and sells a wide range of computer software, including the Windows operating-system software installed on most personal computers in the United States. Microsoft also offers Internet access service through its MSN division and under the name "MSN."

9. Best Buy is a leading retailer of consumer electronics, computers and computer-related equipment, computer software, and consumer appliances. Best Buy offers and sells these products through a chain of retail stores that it owns and operates, and over the Internet.

10. Under an agreement signed in April 2000, Microsoft invested \$200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service. In exchange, Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising. In Defendants' own words (in a joint press release), this agreement is "a comprehensive strategic alliance that encompasses

1 broadband, narrowband, in-store and online efforts"; "provides for significant joint marketing in Best  
2 Buy's retail stores, online and through print/broadcast vehicles, profit sharing, the promotion of  
3 BestBuy.com to the 40 million users throughout Microsoft's properties, and technology assistance"; and  
4 pursuant to which "MSN™ Internet access and Microsoft's full range of connectivity solutions will be  
5 demonstrated and sold at the more than 350 Best Buy stores in the U.S. and through BestBuy.com," and  
6 "Best Buy and BestBuy.com will receive prominent and preferred placement across Microsoft  
7 properties, including MSNBC, the Expedia.com™ travel service, Hotmail™ Web-based e-mail service,  
8 WebTV Network™, and the newly launched MSN eShop online shopping service."

9       11. By agreement between Microsoft and Best Buy, one method by which Best Buy  
10 promotes MSN service in its stores is to establish and activate MSN service accounts and trial  
11 subscriptions in the names of Best Buy store customers. Best Buy activates these trial subscriptions in  
12 the names of people when they buy something at a Best Buy store. Recently, for example, when people  
13 have bought a new computer at a Best Buy store, Best Buy has activated six-months-free trial  
14 subscriptions in their names. When people have bought any other merchandise, Best Buy has activated  
15 30-days-free trial subscriptions in their names. Regardless of the length of trial period, however, the  
16 course of conduct complained of herein has been uniform in all material respects.

17       12. By agreement between Microsoft and Best Buy, the establishment and activation of  
18 MSN trial subscriptions is carried out through compact discs issued by Microsoft and containing  
19 Microsoft-developed software that, upon installation, enables one to access the MSN service ("Trial  
20 CDs"). If the customer is paying for the merchandise by credit or debit card, the store employee  
21 "swipes" the card through the magnetic-strip reader and "scans" the bar code on the Trial CD's  
22 packaging using the laser device used for scanning the bar codes on merchandise presented for  
23 purchase.

24       13. By swiping the customer's credit or debit card and scanning the Trial CD at the checkout  
25 counter, the Best Buy store employee sends the customer's credit or debit card information to Microsoft  
26 and immediately establishes and activates an MSN service account and trial subscription in the  
27 customer's name, using the telephone and other data transmission wires. Recently, the length of the  
28 trial period has been set at six months if the customer is buying a new computer, and 30 days if the

1 customer is buying anything else. If the customer does not cancel the subscription by the end of the trial  
2 period, Microsoft, using the telephone and other data transmission wires, starts billing the person's  
3 credit card account for MSN service charges, or deducts the charges from the account linked to the  
4 person's debit card, on a monthly basis.

5 14. Best Buy does not disclose to the customer, nor does the reasonable consumer expect,  
6 that during the processing of the customer's purchase, his or her credit or debit card information is sent  
7 to Microsoft and an MSN service account and trial subscription are established and activated in the  
8 person's name.

9 15. After the scanning of the Trial CD, sometimes the Best Buy employees give the Trial CD  
10 to the customer, saying it is for a free trial subscription to MSN. Customers reasonably understand the  
11 representation to mean only that they have the option of establishing an MSN trial subscription by  
12 installing the software on the Trial CD. In other instances, the Best Buy employees have placed the  
13 Trial CD together with the customer's merchandise in a Best Buy shopping bag without any explanation  
14 to the customer. In still other instances, the Best Buy employees do not give the Trial CD to the  
15 customer at all. If customers ask why the Trial CD was scanned, Best Buy tells them that it is for  
16 inventory control or otherwise misrepresents the purpose of the scanning, and fails to disclose material  
17 information concerning the purpose and consequences of the scanning.

18 16. In short, neither Microsoft nor Best Buy secures valid authorization, in writing or  
19 otherwise, to bill a customer's credit card account or withdraw funds from a customer's debit card  
20 account for MSN charges.

21 17. Customers do not discover that an account has been activated in their name until they  
22 notice, after expiration of the trial subscription period, that monthly charges for MSN service have been  
23 billed to their credit card accounts or deducted from their debit card accounts by Microsoft. Because the  
24 charges are in relatively small amounts, consumers might not notice the charges on their card statements  
25 for some time. If and when they do notice the charges, they must contact Microsoft to cancel their MSN  
26 accounts and stop the unauthorized charges and to seek refunds of the charges. Microsoft has directed  
27 some consumers who contact Microsoft about the charges to seek relief from their credit or debit card  
28 issuers. No consumers have received (a) full refunds for the unauthorized monthly charges billed to or

1 deducted from their card accounts; plus (b) full refunds or compensation for the finance charges accrued  
2 on such charges; plus (c) interest on the money paid by the consumers for the period it was held by  
3 Microsoft; plus (d) compensation for the time, effort, and expense spent by the consumers in canceling  
4 their MSN accounts and seeking refunds for the charges. Thus, no consumers have been placed in the  
5 position they were in before Defendants, without the consumers' knowledge or valid authorization,  
6 established MSN accounts in their names and assessed MSN charges against their credit or debit cards.

7 18. The above policies and practices by Best Buy and its employees relating to scanning of  
8 the Trial CDs including but not limited to the deliberate failure to make disclosures and making of  
9 misrepresentations – have been formulated and implemented by Best Buy jointly with Microsoft, by  
10 agreement with Microsoft, and/or with Microsoft's knowledge and approval for the benefit of both Best  
11 Buy and Microsoft.

12 19. In May 2002, Plaintiff James Odom purchased a laptop computer at a Best Buy store in  
13 Pleasant Hill, California, with payment by a credit card. The Best Buy employee processing his  
14 purchase scanned a Trial CD and, through the swiping of Mr. Odom's credit card, established and  
15 activated a six-month MSN trial subscription in his name and sent his credit card information to  
16 Microsoft. The employee did not tell Mr. Odom that his credit card information was being sent to  
17 Microsoft or that an MSN account was being established and activated in his name, nor was Mr. Odom  
18 given any reasonable basis for believing these things were being done.

19 20. At no time following his purchase of the laptop computer did Mr. Odom use the MSN  
20 service, not knowing even that a subscription had been activated in his name. After six months had  
21 elapsed since Best Buy scanned the Trial CD, Microsoft started billing Mr. Odom's credit card account  
22 for monthly MSN charges. Microsoft billed Mr. Odom's credit card for the charges for two months.  
23 Mr. Odom noticed the MSN charges on his credit card bills, called Microsoft, and cancelled the MSN  
24 account that had been established in his name through Best Buy. Mr. Odom paid the MSN charges as  
25 part of his overall credit card bills. He has not received any refund or credit for those charges.

26 21. In September 2001, Plaintiff Katherine Mourcaux-Maloney purchased a cell phone and  
27 cell phone service plan at a Best Buy store in Reno, Nevada, with payment by a debit card. The Best  
28 Buy employee processing her purchase scanned a Trial CD and, through the swiping of Ms. Moureaux-

1 Maloney's debit card, established and activated a 30-day MSN trial subscription in her name and sent  
 2 her debit card information to Microsoft. The employee did not tell Ms. Moureaux-Maloney that her  
 3 debit card information was being sent to Microsoft or that an MSN account was being established and  
 4 activated in her name, nor was Ms. Moureaux-Maloney given any reasonable basis for believing these  
 5 things were being done. Ms. Moureaux-Maloney did not provide valid authorization in writing for  
 6 Microsoft to withdraw monthly MSN charges from her debit card account, nor did Best Buy or  
 7 Microsoft provide her with a copy of any such purported authorization when purportedly made.

8       22. At no time following her purchase of the cell phone did Ms. Mourcaux-Maloney use the  
 9 MSN service (not knowing even that a subscription had been activated in her name). In October 2000,  
 10 after 30 days had elapsed since Best Buy scanned the Trial CD, Microsoft started withdrawing monthly  
 11 MSN charges from Ms. Moureaux-Maloney's debit card account. Microsoft withdrew monthly MSN  
 12 charges from her debit card account for 17 months. In November 2003, Ms. Moureaux-Maloney  
 13 received a bill for monthly MSN charges for April, May, and June 2003, because Microsoft was unable  
 14 to continue withdrawing the charges from her debit card account. She and her husband immediately  
 15 contacted Microsoft and discovered that an MSN account had been established in her name through  
 16 Best Buy. Upon reviewing her bank statements, Ms. Moureaux-Maloney discovered previous  
 17 withdrawals Microsoft had made from her debit card account for monthly MSN charges.  
 18 Ms. Moureaux-Maloney has not received any refund for any of the MSN charges that Microsoft  
 19 withdrew from her debit card account, and Microsoft continues to seek payment from her of MSN  
 20 charges for April, May, and June 2003.

#### 21 CLASS ACTION ALLEGATIONS

22       23. Plaintiffs bring this action on behalf of themselves and a plaintiff class initially defined  
 23 as follows:

24 All people in whose names an MSN service account and trial subscription  
 25 were established and activated by the scanning of a Trial CD at a Best  
 Buy store, during the period from May 15, 1999 to the present.

26 Excluded from the class are Defendants, any entity in which any Defendant has a controlling interest,  
 27 Defendants' officers, directors, and employees; Defendants' legal representatives, heirs, successors, and  
 28 assigns; and any Judge to whom this case is assigned and his or her immediate family.

24. Plaintiff Mourcaux-Maloney also bring this action on behalf of a subclass of the plaintiff class initially defined as follows:

All people in whose names an MSN service account and trial subscription were established and activated by the scanning of a Trial CD and the swiping of their debit card at a Best Buy store, during the period from May 15, 2002 to the present, and from which debit card account Microsoft subsequently withdrew amounts for monthly MSN charges.

25. This action has been brought and may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

26. **Numerosity of the class – Fed. R. Civ. P. 23(a)(1).** Class and subclass members are so numerous that their individual joinder herein is impracticable. Plaintiffs estimate that the class numbers in the thousands or tens of thousands, and that the subclass numbers in the hundreds or thousands. The precise number of class and subclass members and their addresses are unknown to Plaintiffs, but can be obtained from Microsoft's and Best Buy's records. Class and subclass members may be notified of the pendency of this action by mail, supplemented by published notice if deemed necessary by the Court.

27. **Existence and predominance of common questions of fact and law – Fed. R. Civ. P. 23(a)(2), 23(b)(3).** Common questions of law and fact exist as to all class and subclass members. These questions predominate over the questions affecting only individual class or subclass members and include:

- (a) Whether the transmission of a Best Buy store customer's credit or debit card information to Microsoft through Best Buy's scanning of a Trial CD, without adequate notice or disclosure to the customer, constitutes wire fraud;
- (b) Whether the establishment and activation of an MSN service account and trial subscription in a Best Buy store customer's name through Best Buy's scanning of a Trial CD, without adequate notice or disclosure to the customer, constitutes wire fraud;
- (c) Whether Defendants, by their agreement that Best Buy will promote MSN Internet access service and their activities in furtherance of the agreement, constitute an "enterprise" as defined in 18 U.S.C. § 1961(4) that is engaged in, or the activities of which affect, interstate or foreign commerce;

- 1 (d) Whether the policies and practices described above constitute Defendants'  
2 conduct or participation, directly or indirectly, in the conduct of such enterprise's  
3 affairs through a pattern of racketeering activity;
- 4 (c) Whether Defendants have violated 18 U.S.C. § 1962(c);
- 5 (f) Whether Defendants have conspired to violate 18 U.S.C. § 1962(c), in violation  
6 of 18 U.S.C. § 1964(d);
- 7 (g) Whether Defendants have initiated electronic transfers of funds from the debit  
8 card accounts of subclass members on a recurring basis, at substantially regular  
9 intervals, without first obtaining the subclass members' valid authorization in  
10 writing or providing them with a copy of any such purported authorization;
- 11 (h) Whether Defendants have violated 15 U.S.C. § 1693e with respect to the subclass  
12 members;
- 13 (i) Whether the transmission of a Best Buy store customer's credit or debit card  
14 information to Microsoft through Best Buy's scanning of a Trial CD, without  
15 adequate notice or disclosure to the customer, is a practice that has the capacity to  
16 deceive a substantial portion of the public;
- 17 (j) Whether the establishment and activation of an MSN service account and trial  
18 subscription in a Best Buy store customer's name, through Best Buy's scanning  
19 of a Trial CD that it then gives to the customer, without adequate notice or  
20 disclosure to the customer, is a practice that has the capacity to deceive a  
21 substantial portion of the public;
- 22 (k) Whether Defendants have violated the Washington Consumer Protection Act,  
23 Wash. Rev. Code § 19.86.020;
- 24 (l) Whether Defendants have been unjustly enriched through the conduct  
25 complained of;
- 26 (m) Whether Defendants can show that they obtained valid authorization from all  
27 class members to bill class members' credit card accounts or withdraw funds  
28 from class members' debit card accounts for MSN charges.



1       28.     **Typicality – Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of the  
2 class, because, as with all other class members, an MSN service account and trial subscription were  
3 established and activated in their names by Best Buy's scanning of a Trial CD at a Best Buy store.  
4 Plaintiff Mourcaux-Maloney's claims are typical of the claims of the subclass, because, as with all other  
5 subclass members, an MSN service account and trial subscription were established and activated in her  
6 name by Best Buy's scanning of a Trial CD at a Best Buy store and swiping of her debit card at a Best  
7 Buy store, and Microsoft subsequently withdrew amounts from that debit card account for monthly  
8 MSN charges.

9       29.     **Adequacy – Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate representatives of the class  
10 and subclass, because their interests do not conflict with those of the class or subclass, and they have  
11 retained counsel experienced and competent in consumer class action litigation. The interests of the  
12 class and subclass members will be fairly and adequately protected by Plaintiffs and their counsel.

13       30.     **Superiority – Fed. R. Civ. P. 23(b)(3).** The class action is superior to other available  
14 means for the fair and efficient adjudication of class and subclass members' claims. The damages or  
15 other financial detriment suffered by individual class and subclass members is relatively small  
16 compared to the burden and expense that would be entailed by individual litigation of their claims  
17 against Defendants. It would thus be virtually impossible for class and subclass members, on an  
18 individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if class and  
19 subclass members could afford such individualized litigation, the court system could not.  
20 Individualized litigation would create the danger of inconsistent or contradictory judgments arising from  
21 the same set of facts. Individualized litigation would also increase the delay and expense to all parties  
22 and the court system from the issues raised by this action. By contrast, the class action device provides  
23 the benefits of adjudication of these issues in a single proceeding, economics of scale, and  
24 comprehensive supervision by a single court, and presents no unusual management difficulties under  
25 the circumstances here.

26       31.     In the alternative, the class and subclass may be certified under Rule 23(b)(1) and/or  
27 (b)(2), because:  
28

(a) the prosecution of separate actions by individual class or subclass members would create a risk of inconsistent or varying adjudication with respect to individual class or subclass members that would establish incompatible standards of conduct for Defendants;

(b) the prosecution of separate actions by individual class or subclass members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other class or subclass members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

(c) Defendants have acted or refused to act on grounds generally applicable to the class and subclass, thereby making appropriate final and injunctive relief with respect to the members of the class and subclass as a whole.

### **FIRST CLAIM FOR RELIEF**

#### **(For Violations Of RICO, 18 U.S.C. § 1962(c))**

32. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference each allegation set forth above as if fully set forth here, and further allege as follows:

33. Defendants are "persons" as defined in 18 U.S.C. § 1961(3).

34. Defendants's agreement that Microsoft will advertise and promote Best Buy and its online store on its MSN Internet access service and various Microsoft-owned Websites, while Best Buy will advertise and promote MSN service in its "bricks and mortar" and online stores, together with Defendants' activities in furtherance of the agreement, constitute an "enterprise" as defined in 18 U.S.C. § 1961(4). Furthermore, this enterprise is engaged in, and its activities affect, interstate or foreign commerce.

35. The material decisions guiding the operation of this enterprise -- including but not limited to decisions concerning the form and content of campaigns, advertising, and other vehicles used by either Defendant to promote the other's products and services pursuant to their agreement (and including the design and implementation of the mechanisms through which MSN accounts are

1 established by the swiping of a Best Buy store customer's credit or debit card and the scanning of a  
2 Trial CD) – are made by Defendants jointly.

3 36. Defendants' policies, practices, and acts described above constitute wire fraud under  
4 18 U.S.C. § 1343, in that they constitute or are in furtherance of a scheme or artifice to defraud or  
5 obtain money by means of false or fraudulent pretenses, furthered or executed through Defendants'  
6 transmission of writings, signals, or data by means of wire.

7 37. By establishing MSN accounts in the names of thousands or tens of thousands of  
8 consumers without their knowledge and assessing MSN charges against their credit or debit cards,  
9 through the course of conduct described above, Defendants have committed wire fraud thousands or  
10 tens of thousands of times over the past four years and thus engaged in a "pattern of racketeering  
11 activity" as defined in 18 U.S.C. § 1961(5).

12 38. Defendants have used a structure separate and apart from their acts of wire fraud to  
13 distribute the proceeds of the transactions. In particular, for each MSN trial subscription and account  
14 established and activated at a Best Buy store, Best Buy receives a flat payment from Microsoft. When  
15 the trial period ends and Microsoft starts billing the customer for monthly MSN charges, Microsoft  
16 gives Best Buy a portion of each monthly MSN charge paid by the customer.

17 39. Therefore, Defendants have violated 18 U.S.C. § 1962(c) in that they are associated with  
18 an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, and have  
19 conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a  
20 pattern of racketeering activity.

21 40. Plaintiffs and the other class members have been injured in their business or property by  
22 reason of Defendants' violations of 18 U.S.C. § 1962(c). Accordingly, Plaintiffs, on behalf of  
23 themselves and all others similarly situated, seek treble damages and costs of suit, including a  
24 reasonable attorneys' fee.

## 25 **SECOND CLAIM FOR RELIEF**

### 26 **(For Violations Of RICO, 18 U.S.C. § 1962(d))**

27 41. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by  
28 reference each allegation set forth above as if fully set forth here, and further allege as follows:

42. Defendants agreed to participate in the affairs of the enterprise described above through the commission of two or more predicate offenses by either of them. In particular, Defendants agreed to commit wire fraud thousands or tens of thousands of times over the past four years, as described above, and in fact did so.

43. Therefore, Defendants have conspired to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d).

44. Plaintiffs and the other class members have been injured in their business or property by reason of Defendants' violations of 18 U.S.C. § 1962(d). Accordingly, Plaintiffs, on behalf of themselves and all others similarly situated, seek treble damages and costs of suit, including a reasonable attorneys' fee.

### **THIRD CLAIM FOR RELIEF**

**(For Violations Of The Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq.)**

45. Plaintiff Moureaux-Maloney, on behalf of herself and the subclass, incorporates by reference each allegation set forth above as if fully set forth here, and further alleges as follows:

46. This claim is asserted on behalf of the subclass defined above.

47. Defendants have initiated electronic transfers of funds from the debit card accounts of subclass members on a recurring basis, at substantially regular intervals, without first obtaining the subclass members' valid authorization in writing or providing them with a copy of any such purported authorization.

48. Therefore, Defendants have violated 15 U.S.C. § 1693e.

49. Accordingly, on behalf of herself and the subclass, Plaintiff Moureaux-Maloney seeks actual damages, statutory damages, and costs of suit, including a reasonable attorneys' fee, under 15 U.S.C. § 1693m.

### **FOURTH CLAIM FOR RELIEF**

**(For Violations Of The Washington Consumer Protection Act,  
Wash. Rev. Code § 19.86.010 et seq.)**

50. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference each allegation set forth above as if fully set forth here, and further allege as follows:

1           51.     Microsoft and Best Buy are "persons" within the meaning of the Washington Consumer  
2 Protection Act, Wash. Rev. Code § 19.86.010(1), and conduct "trade" and "commerce" within the  
3 meaning of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

4           52.     Plaintiffs and members of the class are "persons" within the meaning of the Washington  
5 Consumer Protection Act, Wash. Rev. Code § 19.86.010(1), and the payments for MSN charges  
6 wrongfully obtained from Plaintiffs and members of the class constitute "assets" within the meaning of  
7 the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010(3).

8           53.     Defendants' actions are unfair and/or deceptive within the meaning of the Washington  
9 Consumer Protection Act, Wash. Rev. Code § 19.86.010 et seq.

10          54.     Defendants' actions as alleged herein occurred in the conduct of trade or commerce  
11 directly or indirectly affecting the people of the State of Washington through their retail and Internet  
12 service businesses, and as well as the people of all of the other fifty States and the District of Columbia.

13          55.     Defendants' actions as alleged herein have the tendency or capacity to mislead  
14 consumers in that MSN accounts were established in the names of consumers and their credit or debit  
15 card information sent to Microsoft without adequate disclosure to the consumers, including but not  
16 limited to disclosure that an account was being established and activated in their names, that their credit  
17 or debit card information was being sent to Microsoft, and that monthly MSN charges would be billed  
18 to their credit or debit cards after the account trial period expired.

19          56.     Defendants' general course of conduct has an impact on the public interest, and the acts  
20 complained of herein are ongoing and/or have a substantial likelihood of being repeated.

21          57.     Defendants' conduct injured Plaintiff's property and the property of all others similarly  
22 situated.

23          58.     Plaintiffs and members of the class are therefore entitled to an order enjoining the  
24 conduct complained of herein; actual damages; treble damages; costs of suit, including a reasonable  
25 attorneys' fee; and such further equitable relief as the Court may deem proper.

**FIFTH CLAIM FOR RELIEF**

**(For Unjust Enrichment)**

59. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference each allegation set forth above as if fully set forth here, and further allege as follows:

60. A benefit was conferred on Defendants when Plaintiffs and members of the class were unknowingly signed up for MSN Internet service and payments for monthly MSN charges wrongfully obtained from them.

61. Defendants were aware and had knowledge of the benefit they were receiving and have enjoyed their financial gains.

62. Despite the misleading and deceptive nature by which Plaintiffs and other consumers were unknowingly signed up for MSN Internet service, Defendants accepted and retained the full benefit of payments from Plaintiffs and members of the class.

63. Defendants' retention of this benefit is inequitable and must be returned to Plaintiffs and members of the class.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for relief as follows:

A. An order certifying the proposed plaintiff class and subclass under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiffs and their counsel of record to represent the class and subclass;

B. Actual damages;

C. Treble damages;

D. Statutory damages under 15 U.S.C. § 1693m;

E. An injunction prohibiting Defendants from engaging in the conduct complained of;

F. Attorneys' fees and costs of suit, including expert-witness fees and prejudgment interest; and


G. Such other relief as the Court may deem proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury on all claims so triable.

DATED: November 19, 2003

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The Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JAMES ODOM, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

MICROSOFT CORPORATION, et al.,

Defendants.

No. C03-2976P

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2003:

FIRST AMENDED COMPLAINT

was served upon the following counsel via the methods indicated:



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Signed this day the 19<sup>TH</sup> of November, 2003.


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